No. 83-1449

In the Supreme Court of the United States

OCTOBER TERM, 1983

DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DIVISION OF RWDSU, AFL-CIO, PETITIONER

v.

SAUNDERS HOUSE a/k/a THE OLD MAN'S HOME OF PHILADELPHIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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TABLE OF AUTHORITIES

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The court of appeals in this case denied enforcement of an order of the National Labor Relations Board on the ground that the Union and the Employer had reached impasse in bargaining.[1]

1. The Union and the Employer began negotiations for an initial contract following certification of the Union as bargaining representative of the Employer's employees on August 28, 1980. Prior to the initial bargaining session, the Union submitted a contract proposal that provided for an

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[1] As a party in the court of appeals, the Board is a respondent in this Court pursuant to Sup. Ct. R. 19.6.

across-the-board wage increase, a cost-of-living increase, union security, and dues checkoff. Pet. App. 4a-5a. The parties met a total of 17 times over a seven-month period beginning September 16, 1980. The Employer, however, did not make any proposals or engage in discussions concerning wages during any of the early negotiating sessions. Pet. App. 4a-7a.[2]

On November 24, 1980, the Union asked for the Employer's position on wages, union security, and dues checkoff; the Employer rejected the Union's proposals on union security and checkoff, and stated that it would present a wage proposal at the next session. On December 2, 1980, the Union made a new proposal for annual increases over three years; the Employer countered with an offer of a cost-of-living increase for one year but refused to engage in further discussion of wages at that session or at the following three meetings. Pet. App. 6a-7a.

The parties met again on February 6, 1981, and agreed to review their bargaining positions. At an "off the record" meeting on February 20, the union representative described as ultimately acceptable to the Union three successive annual increases of eight percent, modified union security, and dues checkoff. The Employer's negotiator agreed to present a formal wage proposal at the next session, and on March 2 the Employer proposed a complete revision of wages resulting in an average increase of six and one-half percent. This was the Employer's final offer. The Union made a counterproposal on March 5 for a series of increases ranging from eight to 10 percent with no cost-of-living

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[2]After the first bargaining session, the Employer declared negotiations over wages to be at impasse and unilaterally implemented an eight percent increase. The Union filed unfair labor practice charges, and the matter was resolved through an informal settlement agreement. Pet. App. 5a-6a & n.2.

increase. The Employer did not respond. Pet. App. 7a-9a. On March 16 the Federal Mediation and Conciliation Service appointed a board of inquiry to aid in negotiations. The parties rejected the board's nonbinding recommendations; however, the Union subsequently adopted a modified union shop proposal that the board had recommended. The Employer continued to insist on its March 2 offer. *Id.* at 9a-10a.

On April 15 the Union presented a series of proposals that included an eight percent wage increase in each of three years with no cost-of-living increase, as well as provisions for union security, dues checkoff, and grievance procedures. In addition, the Union added a proposal for sick leave and dropped a request for the reinstatement of two workers. The Employer's negotiator agreed to discuss the proposal with the Employer, but the next day the Employer notified the Union that it saw no change in the Union's position and that the parties were at impasse. On April 22 the Employer implemented its March 2 wage proposal over the Union's objections. Pet. App. 10a-12a.

2. Based on the above-stated facts, the Board found that no impasse existed at the time the Employer unilaterally instituted the change in wages and therefore that the change violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 12a).[3] In concluding that the parties had not reached impasse, the Board considered the relevant bargaining history, the good faith of the parties,

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[3]In so holding, the Board adopted the conclusion but not the analysis of the administrative law judge (ALJ) (Pet. App. 2a-4a, 12a-13a & n.4). The ALJ found that the Employer had negotiated in bad faith, and thus that no impasse could be found as a matter of law (*id.* at 78a-96a). The Board, concluding that the issue of the Employer's subjective good faith had not been litigated by the parties, held that the violation was based only on the ground that, in fact, impasse had not been reached (*id.* at 12a-13a & n.4).

the length of the negotiations, the importance of the issue as to which there was disagreement, and the contemporaneous understanding of the parties. The Board found that, although negotiations on all issues had been lengthy, the Employer did not make its first and only proposal on the central issue of wages until March 2, and that the Union's April 15 proposal represented movement on significant issues in dispute. Pet. App. 14a-17a. Rejecting the Employer's contention that it was already aware of the Union's proposal after the "off the record" meeting of February 20, the Board held that the April 15 wage offer, made for the first time in formal negotiations and coupled with other proposals, was a new offer by the Union (*id.* at 17a-18a & n.6). Under all the circumstances, "[t]he repetition of proposals made before is not sufficient to nullify the real concessions that the Union was offering" (*id.* at 18a).

3. The court of appeals denied enforcement of the Board's order, concluding that the parties had reached impasse. The court found that the Union's April 15 proposal, although a shift from the Union's earlier formal position, was no different from its February 20 off-the-record proposal that the Employer had rejected with its counteroffer of March 2. Pet. App. 119a. Accordingly, the court held that "there was in fact no real movement" (*ibid.*).[4]

4. The Union contends that the Board's finding of impasse was supported by substantial evidence and that the court of appeals therefore erred in reaching a contrary conclusion. However, the Union, while the charging party before the Board, did not intervene in the court of appeals.

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[4]The court of appeals subsequently denied the Employer's motion for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412. *Saunders House a/k/a The Old Man's Home of Philadelphia* v. *NLRB*, No. 82-3594 (3d Cir. Feb. 17, 1984).

Thus, it was not a party in the court of appeals and has no standing to file a petition for certiorari to review the court's judgment. Sup. Ct. R. 19.6; *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 214 (1965).

In any event, the disagreement between the Board and the court below turns on an evaluation of the specific bargaining negotiations in this particular case. Such a fact-bound issue is not one that this Court ordinarily would review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]The Union also contends (Pet. 35-37) that the effect of the court's decision will be to preclude parties from engaging in candid "off-the-record" discussions during negotiations because such discussions will be held to represent the bottom line of the parties for purposes of determining whether they have reached impasse. This contention misconceives the decisions below. The Board in this case did not hold as a matter of law that off-the-record negotiations can never be considered in determining whether parties have reached impasse, nor did the court of appeals hold that they are always determinative. The Board merely held that impasse was not reached under all the relevant circumstances, and the court disagreed. The court's decision thus was confined to the facts of this case.